

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DARRIS T. TAYLOR,

Petitioner,

vs.

DWIGHT NEVEN, *et al.*,

Respondents.

2:07-cv-00183-KJD-RJJ

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

This matter having come on for an evidentiary hearing before the Court on June 15, 2010, with petitioner having appeared with his counsel, Terrence Jackson, Esq., and respondents having appeared through their counsel, Heather Proctor and Troy Jordan, Esq., and the Court having received testimony and evidence presented on petitioner's contentions seeking to overcome the procedural default bar as to Ground 1 and on the merits of Ground 1, as well as on the answer and reply as to both Grounds 1 and 2, does hereby make the following:

FINDINGS OF FACT

1. Petitioner Darris Taylor challenges two different Nevada state court judgments of conviction. He challenges his March 30, 1998, conviction in No. C134371, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon, in connection with the robbery of Alanna Franklin. (Hereafter, the "Franklin" conviction, trial, case or similar reference as the context requires.) He also challenges his July 19, 2000, conviction in No. C139801, pursuant to a jury verdict,

1 of robbery with the use of a deadly weapon and first degree murder with the use of a deadly
2 weapon, in connection with the robbery and murder of Melvin Charles Rayford. (Hereafter,
3 the “Rayford” conviction, trial, case or similar reference as the context requires.)

4 2. In Ground 1, petitioner alleges that he was denied his right to due process of law
5 in violation of the Fifth and Fourteenth Amendments at both the Franklin trial and the Rayford
6 trial because: (a) the State allegedly solicited or failed to correct false testimony from
7 prosecution witness Akilah City regarding an alleged benefit promised and/or provided to City;
8 and (b) the State allegedly failed to reveal to defense counsel the existence of promises made
9 to City by the prosecution.

10 3. In the exhausted portions of Ground 2 that remain before the Court, petitioner
11 challenges the sufficiency of the evidence supporting both convictions. Petitioner alleges that
12 the evidence supporting the Franklin conviction was insufficient on the basis that Akilah City’s
13 testimony was unreliable because she allegedly had a strong motive to lie. Petitioner alleges
14 that the evidence supporting the Rayford conviction was insufficient because the State’s
15 evidence allegedly was not sufficient to prove the requisite elements of the offenses.

16 4. The evidence presented at the Franklin trial included evidence tending to establish
17 the following.¹

18 In February 1996, Alanna Franklin and Reiko Moss shared an apartment near the
19 University of Nevada, Las Vegas (UNLV) campus. Both attended UNLV, and Franklin had
20 a job at the Las Vegas Valley Water District.²

21 The young women planned a party at the apartment for February 3, 1996, to celebrate
22 Franklin’s twenty-first birthday. Franklin told the security guard at the water district to bring
23 some of his male friends as she knew mostly females. He asked her whether it would be

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25 ¹The Court summarizes trial evidence from the two trials both for general background to Ground 1
and in connection with the challenge to the sufficiency of the evidence in Ground 2.

26 The Court makes no credibility findings or other factual findings regarding the truth or falsity of the
27 trial evidence over and above a finding that the evidence at trial included such evidence. No statement of fact
made in summarizing the evidence otherwise constitutes a finding of fact by this Court.

28 ²#42, Ex. 11, at 41-43 (Reiko Moss); *id.*, at 68-69 (Alanna Franklin).

1 alright to bring Derrell Price, who Franklin had met several times before. The guard referred
2 to the fact that Price was interested in her. Franklin responded that it would be alright to invite
3 Price but asked him to let Price know that he should not think that anything would happen
4 between them at the party.³

5 Derrell Price came to the party with a number of other males, including Darris Taylor.
6 During the party, there was a degree of conflict between Price and Franklin, as he wanted to
7 be alone with her and she wanted to enjoy her birthday party. As Franklin described it, she
8 gave Price "the cold shoulder." According to Deidre Hilton, a friend of Franklin's at the party,
9 Darris Taylor kept going into the back rooms in the apartment despite being told to stay in the
10 living room area with the rest of the guests. According to Hilton, Taylor was argumentative
11 when they told him not to go into the back, and he also argued with Franklin. In her
12 testimony, however, Franklin did not recall having words with Taylor in addition to Price.⁴

13 The next afternoon, Reiko Moss and a friend were leaving the apartment to go
14 somewhere else. When Moss opened the door to leave, Darris Taylor was standing at the
15 door. He had not knocked prior to her opening the door to leave but instead was just standing
16 there, looking "a little lost." Taylor asked whether they had seen his pager in their apartment
17 from the party the evening before. Moss said that she had not seen it, and she went to the
18 back to ask Franklin, who was taking a nap. Moss then asked Taylor for his name and phone
19 number in the event that they found the pager. She wrote down "D," which Taylor also went
20 by, and a telephone number which later investigation confirmed was Taylor's number.⁵

21 About thirty minutes later, Franklin got up and was taking a shower, as she was
22 expecting a girlfriend to come by. She heard a knock at the door and answered in her towel,
23 thinking that it was her friend. A woman who she later positively identified from a photograph,
24 both at the preliminary hearing and a trial, as Akilah City instead was at the door. Franklin
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26 ³#42; Ex. 11, at 44 (Moss); *id.*, at 69-70 & 87-89 (Franklin).

27 ⁴#42, Ex. 11, at 44-45 & 54-55 (Moss); *id.*, at 59-67 (Deidre Hilton); *id.*, at 70-74 & 87-90 (Franklin).

28 ⁵#42, Ex. 11, at 46-49, 55-56 (Moss); *id.*, at 74 & 90-91 (Franklin); #43, Ex. 12, at 159 & 167.

1 had not met City prior to that time. City said that she had been at the party the night before
2 and that she had left her pager at the apartment. Franklin let her into the apartment to look
3 for the pager, initially believing that she was telling the truth. As Franklin questioned City
4 further about details, such as who she came with, City kept dodging the question.⁶

5 City started using Franklin's cell phone in a purported effort to try and locate the
6 allegedly missing pager. At this point, there was another knock at the door. Franklin again
7 answered in her towel, thinking once again that it was her friend. Darris Taylor instead was
8 at the door with Derrell Price in the background. Taylor tried to in Franklin's words "barge in,"
9 and Franklin asked whether they were with City. No one answered and they instead were
10 quiet and just looked at one another. Franklin pushed Taylor back outside saying that she
11 was in her towel and that the other young woman was looking for her pager. Taylor said
12 words to the effect of "sure, sure . . . we'll wait outside." Franklin closed and locked the door.⁷

13 Franklin and City then went to look one more time in the back bedroom and bath.
14 When they reached the back, City put a handgun to Franklin's waist and told her to get down.
15 Franklin said that "you guys" can take anything that you want. City taped Franklin's hands,
16 feet, mouth and over her eyes with duct tape, while continuing to threaten her with the gun.
17 As City was doing this she said that "those two guys that are out there, they're not with me
18 . . . you know, I'm not associated with them."⁸

19 Franklin then felt City put the gun to her temple, and she kept it there for a moment.
20 Then all of a sudden Franklin saw flashes of light, and she thought that City had shot her in
21 the head. She felt blood flowing down from her head.⁹

22 As Franklin fell back, she heard City run out and the door close. As Franklin wondered
23 why City had just killed her and run out, she hear her return with two males. Franklin
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25 ⁶#42, Ex. 11, at 74-77 & 91-92 (Franklin).

26 ⁷*Id.*, at 77-78 & 92-93.

27 ⁸*Id.*, at 78-80 & 93-94.

28 ⁹*Id.*, at 80.

1 recognized Derrell Price's voice, but she did not recognize the other male voice. She had not
2 ever seen Darris Taylor prior to her party the night before.¹⁰

3 Franklin lay there as if unconscious or dead, as she did not want the three to know that
4 she still was conscious. City yelled at the two males that "you guys f—ed up" because they
5 had made a mistake and come to the door too early. Franklin heard the two males come
6 back to where she was, and she heard them commenting "man . . ." as to what City had done
7 to her. Franklin then heard the three ransacking the apartment and dumping things on the
8 floor as they discussed what they should take. At one point, one of the males said that they
9 thought that City was supposed to put Franklin in the closet. City rolled Franklin off the bed
10 and tried to put her in the closet, but she was a dead weight because she was pretending to
11 be unconscious. Franklin let the towel fall off of her because she did not want to let the three
12 know that she was conscious.¹¹

13 When the three had finished ransacking the apartment and were getting ready to leave,
14 one of the males told the other two to wait in the car because he had "something to handle
15 back there." City said that they did not have time "for this" and that if the male stayed they
16 would leave him. All three then left together.¹²

17 After several minutes of effort, Franklin worked her hands and an eye sufficiently free
18 to call 911. The police arrived quickly, seemingly in less than a minute.¹³

19 When Officer Kevin Skehan and his partner arrived, they saw through the window of
20 the first floor apartment that the apartment was "apparently ransacked" and "in a great
21 disarray." The front door was slightly ajar. The officers entered the apartment with guns
22 drawn and conducted a sweep of the apartment to confirm that there were no threats present.
23 #42, Ex. 11, at 29-33 (Officer Skehan).

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25 ¹⁰#42, Ex. 11, at 71, 80-82 & 94-95 (Franklin).

26 ¹¹*Id.*, at 80-83.

27 ¹²*Id.*, at 83-84.

28 ¹³*Id.*, at 84-85.

1 As the officers entered the apartment, they heard a low, crying voice from the back.
2 As they swept the apartment for threats and reached the back bedroom, Officer Skehan saw
3 Franklin sitting on the bed naked holding a pillow in front of her and bleeding profusely about
4 the head. She had duct tape on her hands and feet as well as across her eyes, and there
5 was a piece of duct tape that was around her neck as if it had slipped from her mouth.¹⁴

6 Officer Skehan immediately retrieved a Polaroid camera from his patrol car and
7 memorialized Franklin's appearance only moments after the attack and robbery.¹⁵

8 Medical personnel arrived as he did so, and Franklin was given immediate medical
9 attention. As noted, she was bleeding profusely; and she was "very traumatized," "extremely
10 upset," "shaken, visibly shaken," and crying. Franklin told the officers what had happened,
11 and she gave them the name of Derrell Price as one of the three involved in the robbery.¹⁶

12 The crime scene analyst observed, *inter alia*, that in the bedroom there was blood on
13 the bedding, a bloodstain on the carpet, and ransacked drawers; that in the living room there
14 were tapes scattered on the floor near the entertainment center and an empty area there as
15 if something were missing; and that there was "just general ransacking apparent."¹⁷

16 As Franklin was being wheeled out by the medical personnel to the ambulance, Reiko
17 Moss returned to the apartment after having been gone for about thirty minutes. Franklin's
18 face and hair were "full of blood."¹⁸

19 Moss observed that the apartment "was tore up" and every room was "just trashed."
20 Missing items included jewelry, money, a CD player, the compact discs, a VCR, and a purse
21 that Moss had just set down in the kitchen a short time before when she was at the
22 apartment. #42, Ex. 11, at 50 (Moss); see also *id.*, at 86-87 (Franklin).

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24 ¹⁴#42, Ex. 11, at 33-35 & 38 (Skehan).

25 ¹⁵*Id.*, at 35-36 (Skehan).

26 ¹⁶*Id.*, at 36-38 (Skehan); *id.*, at 85 (Franklin).

27 ¹⁷*Id.*, at 106-09 (crime scene analyst).

28 ¹⁸*Id.*, at 49-50 & 57-58 (Moss).

1 Moss later saw Darris Taylor's grandmother at the preliminary hearing with a purse that
2 she identified from the condition of and a mark on the purse as the same purse. The purse
3 was confiscated and booked into evidence.¹⁹

4 When Franklin was examined by medical personnel, it was determined that she had
5 not been shot but instead had been struck three times in the head, which required seventeen
6 stitches.²⁰

7 Over the course of the investigation, the police interviewed Derrell Price first, then
8 Darris Taylor, and Akilah City last.²¹

9 Taylor's taped police interview was played for the jury at trial.²²

10 In the interview, Taylor did not dispute that he was at the party with Derrell Price the
11 evening before. According to Taylor, Derrell Price thought that he was going to "hook up" with
12 Alanna Franklin at the party but she rejected him. Price stated that he was going to come
13 back and "rob this bitch" to "show her whose the boss." According to Taylor, Price knew a girl
14 named Akilah who had a gun and contacted her.²³

15 Taylor made conflicting statements in the interview regarding his knowledge of the gun.
16 At one point, he states that he never saw a gun. At another, he states that he saw Akilah City
17 go to the door of the apartment with the gun and that that was "the last I seen of the girl and
18 the gun." At yet another point in the interview, Taylor once again states that he did not see
19 a gun. Taylor further maintained that the day of the incident was only the second time that
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21 ¹⁹#42, Ex. 11, at 51-54 & 56-58 (Moss); #43, Ex. 12, at 163-64 (detective).

22 ²⁰*Id.*, at 87 & 94-95 (Franklin).

23 ²¹#43, Ex. 12, at 158-60, 165 & 169-70 (detective).

24 ²²*Id.*, at 159-63 (detective). It does not appear that the parties have filed a copy of the transcript
25 made of the interview into the record in this federal habeas matter. The following paragraphs describing the
26 content of the interview are drawn from unchallenged and uncontradicted descriptions of the content of the
27 interview at various points in the state court record, including unchallenged -- and uncontradicted -- findings
by the Supreme Court of Nevada regarding Taylor's statements during the interview.

28 ²³#42, Ex. 11, at 23 (State opening statement); #43, Ex. 12, at 208 (State rebuttal argument); #44,
Ex. 39, at 1 & 4 (order of affirmance).

1 he had met Akilah City. According to Taylor, City was more a friend of Derrell Price than a
2 friend of his.²⁴

3 At one point in the interview, Taylor maintained that he went inside the apartment with
4 Price to look for his pager, after City already had entered the apartment. He maintained that
5 City was breathing hard “like a basketball player or something.”²⁵

6 Elsewhere in the interview, Taylor maintained that he went into the apartment to help
7 Price’s friend City move something of hers – “a big purse full of stuff” – from the apartment.
8 He asserted that he never went into the back and stayed only in the living room. He sought
9 to maintain that he did not realize that there possibly may have been a robbery going on until
10 afterwards when he was in Price’s car.²⁶

11 At Taylor’s trial, the defense did not dispute that Taylor was at the party with Derrell
12 Price the evening before, that Taylor was with Price the next day, that Taylor was outside the
13 door of the apartment the next day when Reiko Moss opened the door to leave and found him
14 there, that he left his number with Moss, and that Taylor came back to the same apartment
15 a short time later with Price. The defense maintained, however, as per some of Taylor’s
16 statements to the police, that he went back to the apartment only to help Price’s friend Akilah
17 City move something and that he was aware of nothing else occurring.²⁷

18 Taylor apparently did not anticipate at the time of his statements to the police that the
19 victim would testify at trial, *inter alia*, that she had remained conscious, that she heard City’s
20 statements to the two men consistent with the three having a prior plan, and that she heard
21 Price and the male with him walk back into the bedroom, observe her, and comment. Taylor
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23 ²⁴#43, Ex. 12, at 190-91 & 208-10 (State’s closing and rebuttal arguments); #44, Ex. 39, at 3 & 6
24 (order of affirmance).

25 ²⁵#43, Ex. 12, at 191 & 208-09 (State’s closing and rebuttal arguments).

26 ²⁶#42, Ex. 11, at 23-24 (State’s opening statement); #43, Ex. 12, at 191 & 209-10 (State’s closing and
27 rebuttal arguments); #44, Ex. 39, at 3 & 6 (order of affirmance).

28 ²⁷#42, Ex. 11, at 25-28 (defense opening statement); #43, Ex. 12, at 195, 196 & 197-98 (defense
closing argument).

1 apparently also did not anticipate that Franklin would testify that she heard the three
2 ransacking the apartment as opposed to merely moving something that was packed.

3 Akilah City's testimony at the Franklin trial included testimony as to, *inter alia*, the
4 following.

5 City was eighteen years old at the time of the robbery, and she had known Darris
6 Taylor, who was twenty-two years old at the time of the robbery, for about three years. They
7 were intimate, and, although she did not know it at the time, she was pregnant with his child
8 at the time of the robbery.²⁸

9 On the evening before the robbery, Darris Taylor called City and asked her to help with
10 a robbery of a young woman the next day. The next afternoon, she met up with Darris Taylor
11 and Derrell Price and rode to Franklin's apartment in Price's car. Taylor outlined a plan under
12 which City would knock on Franklin's door and say that she lost her pager, tie up Franklin with
13 duct tape, hit her in the head with a gun, put her in the closet, and then go get the two men
14 to finish the robbery. Taylor provided City with the duct tape and the gun. At Franklin's
15 apartment, everything went according to Taylor's plan except that the two men knocked on
16 Franklin's door while City still was pretending to be looking for a pager.²⁹

17 City thereafter tied up Franklin with the tape and hit her in the head with the gun.
18 Taylor and Price then entered the apartment, and the three started to ransack the apartment.
19 Taylor at one point looked into the bedroom where Franklin was, and he asked City why she
20 had not put Franklin in the closet. Taylor ultimately put Franklin in the closet.³⁰

21 5. When the police questioned Akilah City on March 7, 1996, nearly two years before
22 trial, she gave substantially the same account to the police as she did at Taylor's trial
23 regarding both Taylor's involvement in the Franklin robbery as well as her own actions. At the
24 end of the interview, however, when the detective asked her whether she would like to add
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26 ²⁸#43, Ex. 12, at 133, 135-36 & 144; see also *id.*, at 172 (Taylor's age).

27 ²⁹#43, Ex. 12, at 139-42, 148-50 & 152-53.

28 ³⁰*Id.*, at 142-43.

1 anything, City said that she “didn’t have nothing to do with it.” She made this statement
2 notwithstanding the fact that she had just described in detail her own extensive involvement
3 with Taylor in the Franklin robbery. At trial, City did not deny that she made the statement
4 shown to her from the end of the interview transcript, but she neither recalled making the
5 statement nor knew why she would have said that.³¹

6 6. Akilah City told the police what she told them in March 1996 about Darris Taylor’s
7 involvement in the robbery without the police or the district attorney offering to provide,
8 agreeing to provide, or providing any *quid pro quo*, benefit, or promise of a benefit.

9 Petitioner has not presented any evidence that City made the statements to the police
10 in March 1996 in exchange for a *quid pro quo*. Akilah City’s defense counsel at the time,
11 Virginia Eichacker, was not aware of any *quid pro quo* provided by either the police or the
12 district attorney. Akilah City testified that she did not recall anyone making any promises to
13 her other than an alleged promise by Abbi Silver in 1998 two days before the Franklin trial,
14 which alleged promise is discussed *infra*. Petitioner thus presented no evidence at all that
15 City’s statements in March 1996 were given as part of a *quid pro quo* deal or promise.³²

16 7. On April 9, 1996, nearly two years before the Franklin trial, Akilah City pled guilty
17 to robbery with the use of a deadly weapon for her part in the robbery. At that time, as part
18 of the plea bargain, the State dismissed additional charges against her of conspiracy to
19 commit robbery and burglary while in possession of a firearm arising from the Franklin
20 robbery. Neither the dismissal of the charges nor the plea bargain as a whole was contingent
21 upon any agreement by City to testify against Taylor or to otherwise cooperate with the State.
22 City was sentenced following her plea to two consecutive terms of 26 to 65 months. She had
23 served two years on her sentence by the time of the Franklin trial, and she still was
24 incarcerated at the time that she testified. #43, Ex. 12, at 136-39 & 148-49.

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27 ³¹#43, Ex. 12, at 144-55.

28 ³²#88, Federal Evidentiary Hearing Transcript (“Transcript”), at 12 (Eichacker); *id.*, at 60 (City).

1 8. Then-chief deputy district attorney Abbi Silver was the prosecutor at the Franklin
2 trial. City testified at trial that Silver, who was not involved with her case and plea, had not
3 provided her any benefits or promised her any benefits for testifying.³³

4 9. On January 14, 1998, the day that Akilah City testified in the Franklin case, the
5 remaining evidentiary presentation was completed, the court gave the jury instructions, and
6 counsel made their closing arguments. The court then dismissed the jury to return the
7 following morning to begin deliberations.³⁴

8 10. Later that same day, after the evidence had been concluded and the closing
9 arguments had been made, Silver wrote a letter to the Nevada Board of Parole and Pardons.
10 The letter read as follows:

11 I am writing this letter to apprise the Parole Board
12 regarding Akilah City's cooperation with State Prosecutors on a
13 Co-Defendant's case, State of Nevada v. Darris Taylor. I did not
14 promise, let alone tell Akilah that I would even write a letter like
this, but I wanted to send this on her behalf.

15 Akilah pled guilty to the charge of Robbery With Use of a
16 Deadly Weapon and was sentenced on this case almost two (2)
17 years ago. The Co-Defendant's (the person the State believes
18 convinced Akilah to do this crime) trial was set for January 12,
19 1998. On January 11, 1998, I met with Akilah who was pleasant,
20 and very cooperative with myself and my investigator. She
related to us the same information she gave police and parole
and probation two years prior. Akilah could have refused to
cooperate or testify. Instead, she accepted her role, pled guilty,
is serving her time, and cooperating with law enforcement two
years later. Additionally, Akilah testified against the Co-
Defendant and father of her third child.

21 It is my belief that Akilah is sincere about her remorse for
22 the crime she committed. Further, she accepted responsibility by
23 pleading guilty to Robbery With Use of a Deadly Weapon. She
24 continues to help law enforcement in the matter. The Co-
Defendant is a four-time convicted felon with a Robbery with Use
of a Deadly Weapon case and Murder case pending. Akilah's
assistance is appreciated by the State.

25 #43, Ex. 13.

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27 ³³#43, Ex. 12, at 137-39 & 145.

28 ³⁴#42, Ex. 1, at 13 (minutes).

1 11. Silver made no promise to Akilah City that she was going to send such a letter or
2 provide her any other benefit as a result of her testimony in the Franklin case. There was no
3 prior promise or agreement to provide any *quid pro quo* for her testimony, either with regard
4 to sending such a letter or otherwise.

5 In this regard, this Court finds Silver's testimony that she made no such promise or
6 agreement to be credible. Silver had a good recall of the Franklin case. She used the
7 Polaroid pictures taken of the victim by the first-responding officer as a training aid because
8 the pictures demonstrated how officers could preserve such very effective evidence that
9 would not be available thereafter. While Silver no longer recalled each and every factual
10 particular of the case completely accurately as of the time of her federal hearing testimony,
11 her recollection was reliable as to a substantial matter such as whether she promised a
12 benefit or a *quid pro quo* to a prosecution witness. After hearing her evidentiary hearing
13 testimony and viewing her demeanor, the Court finds that Silver credibly testified that she
14 made no promise or agreement to provide a *quid pro quo* for City's trial testimony.³⁵

15 The Court does not find Akilah City's testimony at the federal evidentiary hearing that
16 Silver made such a prior promise or agreement to be credible. When asked at the outset of
17 her hearing testimony what her relationship was with Taylor, she responded that "[h]e was like
18 my best friend."³⁶ She additionally acknowledged that she wants Taylor to be a part of their
19 now-thirteen year-old son's life.³⁷ Over and above City's still-continuing bond with Taylor, her
20 recollection of the Franklin and Rayford trials had dimmed substantially over the ensuing
21 years. She did not remember even that she had testified twice in two different trials.³⁸ After
22 hearing her evidentiary hearing testimony and viewing her demeanor, the Court finds that
23 City's testimony on this point, at best, reflected an incorrect reconstruction of events in her
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25 ³⁵See Transcript, at 30-42 & 45-51.

26 ³⁶*Id.*, at 53.

27 ³⁷*Id.*, at 53 & 69.

28 ³⁸*Id.*, at 53 & 62-69.

1 mind in an at least subconscious effort to help her friend and the father of one of her children.
2 Her testimony did not credibly establish that Silver made a promise to her to write the letter
3 or provide any other benefit as a *quid pro quo* for her testimony.

4 12. Silver instead prepared and sent the letter as a spontaneous act. She had never
5 written a similar letter on behalf of a witness prior to the Franklin trial, and she never wrote a
6 similar letter thereafter.³⁹

7 13. Silver did not provide a copy of the letter to defense counsel representing Taylor
8 in the Franklin case. Whether correctly or not, she did not believe that the letter, which was
9 not sent as a *quid pro quo*, was required to be copied to defense counsel.⁴⁰

10 14. When Taylor's appellate counsel Lori Teicher prepared the Franklin direct appeal
11 briefing in or around August 2002, she was not aware of the Silver letter. The letter was not
12 part of the defense file in the Franklin case, and Teicher otherwise was not aware of it. It is
13 more probable than not that Teicher would have raised an issue on appeal in this regard if the
14 Silver letter had been present in the Franklin file during the appellate briefing in that case.⁴¹

15 15. The evidence presented at the Rayford trial in May 2000 included evidence
16 tending to establish the following.⁴²

17 In early 1996, Melvin Charles "Ray" Rayford lived in Bloomington, California, in the Los
18 Angeles metropolitan area. Rayford lived with his girlfriend, Keisha Braxton, and their
19 children. In late February 1996, they accepted a number of collect calls for Rayford from a
20 male identifying himself as "Block," which is an alias for Darris Taylor.⁴³

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22 ³⁹See Transcript, at 35-36, 40-41 & 47-48.

23 ⁴⁰See *id.*, at 41-42, 44-45 & 48.

24 ⁴¹See *id.*, at 15-20. Whether such an issue would have been successful on appeal is another matter,
25 as is discussed in Conclusion No. 5, *infra*.

26 ⁴²The Court, again, makes no credibility findings or other factual findings regarding the truth or falsity
27 of trial evidence over and above a finding that the evidence at trial included such evidence. See n. 1, *supra*.

28 ⁴³#43, Ex. 24, at 82-89 (Bates numbering 001066-67)(Braxton); #43, Ex. 23, at 167-68 (detective);

(continued...)

1 On Thursday, February 29, 1996, Rayford drove to Las Vegas in his white Cadillac.
 2 He told Braxton on the phone after he left that he went to Las Vegas to post a surety for
 3 Block. J.B. Starks testified that Rayford told him before he left that he was going to Las
 4 Vegas to post a surety for Darris Taylor and was to receive cocaine in return.⁴⁴

5 On February 29, 1996, Rayford checked into the then-City Center Motel, a two-story
 6 motel in downtown Las Vegas at the corner of East Fremont Street and Seventh Street.⁴⁵

7 It was stipulated at trial that Darris Taylor was not with Rayford on Friday, March 1,
 8 1996, at any time prior to 11:30 a.m. on that date. The parties stipulated that Taylor was
 9 "incapacitated" up until 11:30 a.m. on Friday, March 1, 1996, apparently as a nonpejorative
 10 reference in the jury trial to his being incarcerated.⁴⁶ In an interview with police that is
 11 discussed in greater detail *infra*, Taylor admitted that he was with Rayford after that point up
 12 until, according to Taylor, approximately 12:45 a.m. on Saturday, March 2, 1996.⁴⁷

13 Akilah City testified, *inter alia*, that Taylor called her from the motel during the afternoon
 14 of Friday, March 1, 1996. According to City, Taylor asked her to help him with the murder of
 15 a male acquaintance of his from California who "had a lot of money" in order to steal some
 16 drugs from him. Taylor wanted City to sit in the back seat behind the victim and shoot him
 17 from behind. City refused because "I'm already in enough trouble." Taylor stated in response
 18 that he "would just do it." Phone records showed that calls in fact had been placed from
 19 Rayford's room to the telephone number where City lived.⁴⁸

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 22 ⁴³(...continued)
 #43, Ex. 25, at 59-60 (Taylor's father).

23 ⁴⁴#43, Ex. 24, at 84, 89, & 110 (Bates 001066-67 & 001073)(Braxton); *id.*, at 139-44 & 151 (Bates
 24 001081-81 & 001083)(Starks).

25 ⁴⁵See, e.g., #43, Ex. 21, at 34-36, 44 & 49-51 (housekeeper and front desk clerk).

26 ⁴⁶#43, Ex. 23, at 118-19; see also *id.*, at 130-33 (detective).

27 ⁴⁷ See text, *infra*, at notes 62-68.

28 ⁴⁸#43, Ex. 23, at 11-21, 29-34, 38-40, 41-43 & 45-52 (City); *id.*, at 163-64 & 219-20 (detective).

1 Meanwhile, over the course of Friday, March 1, 1996, Rayford made a number of calls
2 on the cell phone that he brought with him back to Braxton and Starks in southern California.
3 Rayford told Braxton over the course of the day that he was with "Block." Rayford indicated
4 to Braxton that he was waiting for Block "to give him what he paid for," *i.e.*, "what he came out
5 there for." The last call that Braxton received from Rayford was at 9:05 p.m. Rayford
6 indicated to Starks that he was having to wait until midnight to get the cocaine from Taylor
7 and that the amount had been increased. The last call that Starks received from Rayford was
8 at 10:13 p.m.⁴⁹

9 Darris Taylor lived in a bedroom at his grandmother's house. At 2:19 a.m. on
10 Saturday, March 2, 1996, a call was placed from Rayford's room to that number that lasted
11 29 minutes, until 2:45 a.m.⁵⁰

12 At approximately 3:30 to 3:45 a.m. on Saturday, March 2, 1996, Pat Berry, who lived
13 in an apartment at North Eleventh and Stewart Streets, was awakened by the sound of a car
14 pulling into the driveway right under her first-floor window. The apartment was four blocks
15 east and two blocks north of the City Center Motel, or approximately a half mile away over the
16 streets. Berry heard the motor run for a couple of minutes and then stop. She heard car
17 doors opening and closing, like someone was being picked up; and she then heard a different
18 car drive away.⁵¹

19 There were no calls placed on the cell phone that Rayford brought with him from
20 California between 11:04 p.m. on Friday, March 1, 1996, and 5:24 a.m. on Saturday, March
21 2, 1996. At 5:24 a.m. on March 2, 1996, a call was placed that went to a 909 area code
22 number. The 909 area code was the local southern California area code for the cell phone
23 and encompassed the general San Bernardino area, including, *inter alia*, Bloomington,
24

25 ⁴⁹#43, Ex. 23, at 206-09 (detective); *id.*, at 90-94, 110-13, 121-25 (Bates 001068-69, 001073 &
26 001075-76)(Braxton); *id.*, at 147-57 (Bates 001082-84)(Starks).

27 ⁵⁰#43, Ex. 23, at 75, 165-67 & 211 (detectives).

28 ⁵¹#43, Ex. 22, at 151-62 & 166-67.

1 California. Three minutes later, at 5:27 a.m., a call was placed to the same seven-digit
2 number but instead using the Las Vegas area 702 area code. The call was placed to the
3 number of an individual that a detective testified was an acquaintance of Darris Taylor.⁵²

4 At 5:34 a.m. on Saturday morning, March 2, 1996, Taylor called Keisha Braxton in
5 southern California, waking her up. Taylor placed the call on the cell phone that Rayford had
6 brought with him from California. Taylor identified himself as Block and asked Braxton
7 whether Rayford was there. She said that he was not there and asked: "Isn't he with you?"
8 Taylor responded that he had not seen him, and Braxton stated that she would tell Rayford
9 that Taylor had called.⁵³

10 Thereafter, calls were placed on the cell phone that Rayford had brought with him to
11 a number of Darris Taylor's acquaintances and family members. Calls were made to persons
12 known to Taylor over the course of the next three days, up until 1:52 p.m. on March 5, 1996,
13 after which time Taylor once again became "incapacitated." Taylor also called the
14 investigating detectives back on this same cell phone that Rayford had brought with him from
15 California.⁵⁴

16 In the meantime, at some point after 7:00 a.m. on Saturday morning March 2, 1996,
17 the resident of the motel room next to Rayford's room complained to the front desk clerk that
18 there had been a lot of noise in an adjacent room the prior night. The desk clerk recalled the
19 guest stating that the noise came from Rayford's room. An investigating detective testified
20 instead that the guest, who since had deceased, told him that the noise was coming from a
21 party in the room adjacent to his on the other side from Rayford's room. Either way, there
22 either was loud noise coming from Rayford's room or noise coming from another nearby room
23 that possibly may have masked loud noises coming from Rayford's room. The guest in the
24

25 ⁵²#43, Ex. 23, at 200-05 & 211-15; *id.*, Ex. 24, at 65 & 74-75 (Bates 001061 & 001064) (detectives).

26 ⁵³#43, Ex. 23, at 213-14 (detective); *id.*, Ex. 24, at 74-75 (Bates 001064)(detective); *id.*, at 94-96,
27 113-17, 120-21 (Bates 001069, 001073-74, 001075)(Braxton).

28 ⁵⁴#43, Ex. 23, at 214-221 (detective); *id.*, Ex. 24, at 34-35, 65 & 74-77 (Bates 001054, 001061 &
001064)(same).

1 room next to Rayford's further was away from his room from approximately 1:30 to 4:30 a.m.
2 that morning.⁵⁵

3 At approximately 10:00 a.m. that Saturday morning, a City Center Motel housekeeper
4 knocked and announced herself at the door of Rayford's room. When she got no response,
5 she opened the door. She saw a black male slumped over the edge of the bed in the
6 darkened room, however. Thinking that he was sleeping, she closed the door again. The
7 rooms had an additional lock that could be engaged by someone from the inside, but this
8 additional lock had not been engaged, which is why the housekeeper had been able to enter
9 from the outside with the pass key.⁵⁶

10 A short time after checkout time at noon, motel employees again checked on the room.
11 They again observed a nonresponsive black male slumped over the edge of the bed in the
12 darkened room. When the manager saw blood on the bedding and did not see any signs that
13 the man was breathing, he had the front desk call 911.⁵⁷

14 When the police and paramedics arrived, they found Rayford dead on the bed.
15 Rayford had been killed by three .25 caliber gunshot wounds to the left side of his head and
16 face, with at least one of the gunshots having been fired from no more than two feet away.
17 Rayford's body was laying face down partially on the bed with blood and blood spatter on the
18 body and the adjacent bedding and wall. Rayford was clothed in a t-shirt and boxers. There
19 were no other clothes in the room other than a Super Bowl XXX ball cap and a pair of athletic
20 shoes. The medical examiner estimated that the time of death occurred in an approximate
21 range of from thirty to forty hours prior to the autopsy, with thirty hours prior to the autopsy
22 corresponding to 3:00 a.m. on Saturday morning, March 2, 1996.⁵⁸

24 ⁵⁵#43, Ex. 21, at 44, 56-57 & 66-67 (front desk clerk); *id.*, Ex. 24, at 15-19 (Bates 001049-50).

25 ⁵⁶#43, Ex. 21, at 35-42 (housekeeper).

26 ⁵⁷#43, Ex. 21, at 45-47 (front desk clerk); *id.*, Ex. 22, at 16-20 (housekeeper); *id.*, at 23-33 (manager).

27 ⁵⁸#43, Ex. 22, at 35-40 (first responding police officer); *id.*, at 45-62 (deputy medical examiner); *id.*, at
28 (continued...)

1 There were no signs of forced entry or ransacking of the room. Three .25 caliber
 2 expended shell casings or cartridge cases were recovered in the motel room, and three .25
 3 caliber projectiles were recovered during the autopsy. Fingerprints matching Darris Taylor's
 4 fingerprints were recovered from the motel room door.⁵⁹

5 Meanwhile, when Pat Berry arose earlier in the morning of March 2, 1996, she saw a
 6 white Cadillac with a California license plate parked in the driveway under her apartment
 7 window. She checked with neighbors and the apartment manager, but the car was not
 8 connected with anyone there. They decided to have the car towed. It was stipulated at trial
 9 that the car was Rayford's white Cadillac and that it was towed from the alley at 12:10 p.m.
 10 on Saturday, March 2, 1996. The police learned that afternoon that Rayford's vehicle had
 11 been towed from the location, and the police impounded and processed the vehicle.⁶⁰

12 It was stipulated at trial, as to the time period after the murder, that Darris Taylor had
 13 possession of a number of items that had been in Rayford's possession when he came to Las
 14 Vegas from southern California, including distinctive items such as a leather Super Bowl XXX
 15 jacket, a long sleeve Negro League Baseball sweatshirt, a gold herringbone necklace, and
 16 the cell phone that he was using. It further was stipulated that, after Taylor again became
 17 "incapacitated" on March 5, 1996, he had his father retrieve and move the items from his
 18 grandmother's house.⁶¹

19 On Sunday, March 3, 1996, a detective conducted a voluntary interview of Darris
 20 Taylor at his room at his grandmother's house. Taylor stated that he had been with Rayford
 21

22 ⁵⁸(...continued)
 23 72-74, 81-84 & 123 (crime scene analyst); #43, Ex. 23, at 58, 133-34 & 145 (detectives).

24 ⁵⁹#43, Ex. 22, at 72-73, 84, 90-91 & 103-09 (crime scene analyst); *id.*, at 134 (fingerprint examiner);
 25 #43, Ex. 23, at 59-63 & 146-47 (detectives).

26 ⁶⁰#43, Ex. 22, at 162-65 & 168-69 (Berry testimony and stipulation); #43, Ex. 23, at 65-66 & 152-57
 (detectives).

27 ⁶¹#43, Ex. 23, at 199-200; see also *id.*, Ex. 23, at 21-23, 74-82, 95-96, 134-35, 170-78 & 180-99; *id.*,
 28 Ex. 24, at 58-60, 72-73, 99-109, 122 & 126-28 (Bates 001060, 001063, 001070-72, 001076 & 001077); *id.*,
 Ex. 25, at 54-59 (Bates 001137-38)(sundry corroborating testimony to the same effect).

1 on the day and evening of Friday, March 1, 1996, from approximately 11:00 a.m. until
2 approximately midnight. According to Taylor, Rayford was in Las Vegas to post a surety for
3 Taylor and to take some drugs back to Los Angeles. Taylor maintained that the drug
4 transaction was a separate transaction in which he was not involved.⁶²

5 Taylor varied as to details and the specifics of the time line for the period that he was
6 with Rayford. According to Taylor's account, they first ate at a restaurant. They then "kicked
7 it" for an unspecified time, apparently at the motel room. They then went to the home of
8 Taylor's friend Daryl White from approximately 8:00 to 10:00 p.m. They then went to Taylor's
9 room at his grandmother's house. They then went back over to Rayford's motel room.
10 Rayford then dropped Taylor back over at his grandmother's house, at approximately 12:45
11 a.m. on Saturday, March 2, 1996, stopping in for a moment.⁶³

12 Taylor admitted making about five telephone calls from Rayford's motel room. This
13 admission tended to further corroborate Akilah City's testimony that she received a call or
14 calls from Taylor from the motel in the afternoon of March 1, 1996.⁶⁴

15 It was stipulated at trial that Rayford placed a call to a friend of his in Las Vegas from
16 the telephone at Taylor's grandmother's house at approximately midnight.⁶⁵

17 Taylor maintained initially in the interview that Rayford told him when he dropped him
18 back off at his grandmother's house after midnight that he would be returning to California
19 early that morning. Taylor maintained that that was the last time that he heard from Rayford.
20 As the interview progressed, the detective pointed out that phone records showed a call from
21 Rayford's motel room to Taylor's grandmother's house at 2:16 a.m. on Saturday, without the
22 detective telling Taylor the length of the call. Taylor acknowledged that he received the call
23 from Rayford. Taylor maintained that it was only a brief conversation in which Rayford said
24

25 ⁶²#43, Ex. 23, at 173-74; *id.*, Ex. 24, at 19-26 & 44-45 (Bates 001050-52 & 001056)(detective).

26 ⁶³#43, Ex. 24, at 23-34, 44-49 & 70 (Bates 001051-54, 001056-57 & 001063).

27 ⁶⁴*Id.*, at 51 (Bates 001058).

28 ⁶⁵*Id.*, at 51-53 (Bates 001058).

1 that the drug deal was not going to go through and that he would be leaving for California
2 early in the morning. The actual phone record, however, showed that the call lasted 29
3 minutes, until 2:45 a.m. According to Taylor, it was this call that was the last time that he
4 spoke with Rayford.⁶⁶

5 Taylor acknowledged that he had called Keisha Braxton on Saturday morning, March
6 2, 1996, "to see if Rayford had gotten home." This admission lined up both with Braxton's
7 testimony and with the phone records showing a call on the cell phone to Braxton at 5:34 a.m.
8 that morning.⁶⁷

9 At the end of the interview, the detective asked Taylor whether he knew of anything
10 else that would help in the investigation. Taylor did not tell the police that he had the victim's
11 clothing and the cell phone that the victim had been using. The detective saw the phone and
12 other items at the time of the interview, but he did not have sufficient information at that early
13 juncture to know that the items were connected to the victim.⁶⁸

14 That same afternoon, on Sunday, March 3, 1996, Taylor again called Keisha Braxton,
15 once again using the cell phone that Rayford had brought with him from California. Taylor
16 said that the police had been there questioning him and "they think that he did it, but he didn't
17 have anything to do with that." Taylor said that he had not seen Rayford, but he then stated
18 that Rayford had dropped him off and that he had not seen him since that point. Taylor said
19 that he had called to see if Rayford had made it home. Braxton testified that Taylor "was
20 babbling on and on."⁶⁹

21 At some point after March 2, 1996, Don Price, an acquaintance of Taylor's had a
22 conversation with Taylor about the incident. Taylor initially told Price that he and Rayford
23 were at a downtown motel and some fools "from the city," which Price understood to mean
24

25 ⁶⁶#43, Ex. 23, at 165-67 & 211; *id.*, Ex. 24, at 28-31, 34 & 71 (Bates 001052-54 & 001063).

26 ⁶⁷#43, Ex. 24, at 35-36 & 73-75 (Bates 001054 & 001063-64).

27 ⁶⁸#43, Ex. 23, at 170-73; *id.*, Ex. 24, at 37-38 (Bates 1054-55).

28 ⁶⁹#43, Ex. 24, at 36 (Bates 001054)(detective); *id.*, at 97-98 (Bates 001069-70)(Braxton).

1 California, came in and shot Rayford. According to the initial story, however, they gave Taylor
 2 “a pass” because he “didn’t have anything to do with it.” Price doubted the story, however,
 3 and he pressed Taylor with questions. Taylor, in Price’s words, “got disgruntled” and just
 4 said: “It was either him or me.”⁷⁰

5 A fired .25 caliber bullet was recovered from a portion of the ceiling of the bedroom at
 6 Darris Taylor’s grandmother’s house.⁷¹

7 The three .25 caliber bullets recovered during the autopsy all were fired from the same
 8 weapon. The three .25 caliber shell casings found in Rayford’s motel room also all were
 9 expended from a common weapon. It could not be determined conclusively – through
 10 forensic examination – that the three shell casings were expended from the same weapon
 11 from which the three bullets were fired. It further could not be determined from forensic
 12 examination whether or not the .25 caliber bullet recovered at Taylor’s grandmother’s house
 13 was fired from the same weapon as the weapon that killed Rayford. Nor could it be
 14 determined by forensic examination when the .25 caliber bullet recovered at Taylor’s
 15 grandmother’s house was fired into the ceiling or by whom. The .25 caliber round of course
 16 is a very common round of ammunition.⁷²

17 16. When a homicide detective questioned Akilah City on March 8, 1996, about the
 18 Rayford case, she gave substantially the same account that she did at Taylor’s trial, *i.e.*, that
 19 Taylor called her on March 1, 1996, and asked her to help rob and kill an individual.⁷³ She
 20 made these statements to the police over four years before the Rayford trial and nearly two
 21 years prior to the Silver letter.

22 / / / /

24 ⁷⁰#43, Ex. 25, at 70-80 (Bates 001141-43).

25 ⁷¹#43, Ex. 23, at 179-80 (detective); *id.*, Ex. 25, at 14-21 (Bates 001127-28)(crime scene analyst); *id.*,
 26 at 33 (firearms and tool marks examiner).

27 ⁷²#43, Ex. 25, at 33-44 (Bates 001131-34)(firearms and tool marks examiner).

28 ⁷³#43, Ex. 23, at 68-74 (detective).

1 17. Akilah City told the police what she told them in March 1996 about Taylor's request
 2 to her on March 1, 1996, without the police or the district attorney offering to provide, agreeing
 3 to provide, or providing any *quid pro quo*, benefit, or promise of a benefit. The homicide
 4 detective clearly and emphatically testified that he neither offered nor gave City any benefit
 5 in exchange for her statement and that he told her that he would provide no benefit.⁷⁴
 6 Petitioner, who has the burden of proof in seeking federal habeas relief, has not presented
 7 any evidence that City made the statements to the police in March 1996 regarding the
 8 Rayford case in exchange for a *quid pro quo*.

9 18. During her testimony in the Rayford trial, Akilah City testified that neither the
 10 police, the prosecutor in that case, nor any other prosecutor had ever promised to help her
 11 with anything in exchange for her testimony in the Rayford trial.⁷⁵

12 19. At the Rayford trial, defense counsel Dayvid Figler sought to impeach Akilah City's
 13 testimony in this regard in the following fashion, which the Court quotes in full context:

14 Q: Now, the prosecutor asked you if she specifically had
 15 promised you anything, correct?

16 A: Yes.

17 Q: Now you know she works for the District Attorney's Office,
 18 right?

19 A: Yes.

20 Q: You know there is [sic] other district attorneys as well,
 21 correct?

22 A: Yes.

23 Q: Okay.

24 ⁷⁴#43, Ex. 23, at 69-70, 89-91, 127-29 & 139.

25 ⁷⁵*Id.*, at 12-14, 34-35 & 42-43. Petitioner has focused in federal filings on the fact that the prosecutor
 26 in the Rayford trial asked on direct whether "I promised you anything." On cross-examination, however,
 27 defense counsel – when setting City up to impeach her with the Silver letter, as discussed further, *infra* –
 28 elicited testimony from City that neither the prosecutor in that case *nor any other prosecutor* ever had
 promised her anything. The prosecutor on redirect similarly elicited testimony from City ruling out any
 promises by the police, the district attorney's office, or herself. The nuance focused upon by petitioner herein
 thus never has been a material matter. City clearly testified at trial that no prosecutor offered her anything for
 her testimony in the Rayford trial.

1 Now has any district attorney ever promised you help with
2 anything?

3 A: No.

4 Q: Has any district attorney ever promised to do something
5 on your behalf for you?

6 A: No.

7 Q: Has any district attorney ever made any kind of offer of
8 benefit to you whatsoever?

9 A: No.

10 Q: None?

11 A: None.

12 Q: Now, Ms. City, you are currently incarcerated?

13 A: Yes.

14 Q: And you don't like being incarcerated?

15 A: Of course not.

16 Q: Of course not.

17 *You go in front of a parole board or pardon board or*
18 *something like that?*

19 A: Soon, yes.

20 MR. FIGLER: May I approach, your Honor.

21 THE COURT: Yes.

22 MS. DE LA GARZA: May we approach, Judge?

23 THE COURT: Yes.

24 (Off the record discussion not reported.)

25 MR. FIGLER: *I will have you look at that.*

26 THE WITNESS: Okay.

27 MR. FIGLER: Okay.

28 Q: (BY MR. FIGLER) *Looking at this*, is it still your testimony,
yes or no, has any prosecutor ever tried to help you in your
situation?

Yes or no?

1 A: Yes, *with that letter*.

2 Q: Okay?

3 A: *That's the first time I've ever seen it.*

4 Q: Okay

5 #43, Ex. 23, at 34-36 (emphasis added).⁷⁶

6 20. On state post-conviction review in the Rayford case, Taylor's post-conviction
7 counsel, Christopher Oram, made the following representations to the state district court on
8 the record regarding the Silver letter:

9 Your Honor, before I get started, there's a couple of things
10 I need to add to this brief as an officer of the court. First, I have
11 talked to the prosecutor and to Mr. Figler about the letter in
12 question. That was the letter that I'm claiming was an
13 inducement for Akilah City to testify. I have argued in this
14 particular case that the defense did not have it because at the
time in [the] trial transcript Mr. Figler does hand Akilah City a
letter, but it is not identified which letter. Having spoken with the
attorneys, *it is now quite clear that the letter Mr. Figler had is the
letter in question* and the Court should know that.

15 #59, Ex. I, at 2; see also *id.*, at 3 (again acknowledging that "[i]t appears that . . . Mr. Figler
16 did have the letter" and "[i]t appears that he questioned Miss City over the letter").

17 21. In its oral reasons, the state district court made a factual finding that, *inter alia*,
18 it appeared that Dayvid Figler had approached the witness and showed her the Silver letter
19 and that the witness had acknowledged the letter.⁷⁷

20 22. In its written findings, the state district court made a factual finding that state post-
21 conviction counsel had conceded both that trial counsel had a copy of the Silver letter and
22 that he used the letter when cross-examining City. #45, Ex. 48, at 2.

24 ⁷⁶The Court notes the shift between the questions asked and the alleged impeachment offered.
25 Defense counsel asked City – consistently – whether a prosecutor had “offered” or “promised” her any
26 benefit. He then showed her a letter and asked her whether “any prosecutor ever tried to help you,” which is
27 not the same thing as offering or promising a benefit to her. Establishing only that, unbeknownst to City, a
prosecutor had tried to help her did not contradict her testimony that no prosecutor had promised or offered to
help her.

28 ⁷⁷#59, Ex. I, at 7.

23. On the state post-conviction appeal, in addressing the question of whether petitioner had demonstrated cause for the failure to raise the related substantive claims on direct appeal, the Supreme Court of Nevada found, *inter alia*:

. . . . Taylor does not claim that his appellate counsel in the Rayford case [which was Mr. Figler] was unaware of the letter, and counsel should have been aware of it because trial counsel showed it to City during cross-examination and questioned her about it.

#45, Ex. 52, at 3; see also *id.*, at 7 (In discussing a different issue, the state high court found: “Trial counsel showed the letter to City and cross-examined her about it, eliciting from her that the State had tried to help her by writing the letter.”).

24. Taylor’s trial counsel in the Rayford case, Dayvid Figler, was aware of the Silver letter; he had the Silver letter in his possession; and he used the Silver letter to cross-examine Akilah City at the Rayford trial. Accordingly, petitioner was not prevented by alleged State nondisclosure of the letter from raising the substantive claims in federal Ground 1 on the state direct appeal. Trial and appellate counsel, Mr. Figler, had the letter in his possession when he briefed the appeal, as he had cross-examined City about the letter.

Petitioner has not presented credible, much less clear and convincing, evidence to the contrary.

In this regard, the involved assistant district attorney, Melisa De La Garza, testified credibly that it was the Silver letter that Figler presented at the bench conference and then handed to City before cross-examining her on it. De La Garza further testified credibly that she was not aware of and had not seen the Silver letter prior to that time.⁷⁸

////

⁷⁸ Transcript, at 84-88, 90-91 & 95-96. A decade after the fact, De La Garza could not be sure whether Exhibit No. 13 in this case was the same exact letter. However, the letter that she saw at trial was a typewritten letter from Silver to the parole board regarding Akilah City. Petitioner has presented no evidence that there was any other such letter other than the letter in Exhibit No. 13. Petitioner, again, has the burden of proof on federal habeas review, and, in this instance, he further must overcome the state court findings of fact in this regard by clear and convincing evidence. The evidence presented at the federal evidentiary hearing preponderates in support of the conclusion that the letter that Figler showed to the court, opposing counsel, and the witness at the Rayford trial was the Silver letter.

1 Defense trial and appellate counsel, Dayvid Figler, did not give credible testimony to
 2 the contrary. Figler never unequivocally testified that he did not have the Silver letter at trial
 3 and did not cross-examine Akilah City as to the Silver letter. Figler suggested initially in his
 4 testimony only that he had “no recollection” that he had the letter. He further suggested
 5 initially in his testimony that the letter at trial “very well could have been a blank piece of
 6 paper,” “could have been a letter that was written by Darris [Taylor] to Akilah [City],” could
 7 have been a document that he held up only as a bluff, or “could have been a lot of things.”
 8 Later in his testimony, however, he said that he would not have shown the witness a blank
 9 piece of paper. When confronted with the trial transcript, he at first sought to maintain that
 10 he showed the letter referred to at trial to De La Garza and not to the witness.⁷⁹

11 Figler’s testimony in this regard flies in the face of the most probable permissible
 12 reading of the transcript of the trial proceedings quoted in Finding No. 19 above. After
 13 referring to parole proceedings, Figler quite clearly requests *the witness* to look at something
 14 and she responds: “Okay.” Figler then asks the witness whether, after “[l]ooking at this,” it
 15 was still her testimony that no prosecutor ever had tried to help her. The witness responds:
 16 “Yes, *with that letter.*” The testimony clearly is not referring to a letter that the witness has not
 17 been shown, clearly is not referring to a document that merely has been held up by counsel
 18 as a “bluff,” and clearly is not referring to a letter from Taylor to City. The testimony instead
 19 quite clearly is referring to a letter by a prosecutor that was shown to the witness by Figler at
 20 the Rayford trial and that allegedly sought to help her, apparently in connection with parole.
 21 Petitioner – who again has the burden of proof on federal habeas review – has not presented
 22 this Court with any other letter by a prosecutor allegedly seeking to help Akilah City with
 23 regard to parole or any other matter. The only such letter presented on state and federal
 24 post-conviction review has been the Silver letter. The evidence preponderates that Figler
 25 showed City the Silver letter during cross-examination, and nothing in Figler’s federal
 26 evidentiary hearing testimony credibly establishes the contrary to be more likely than not.

27
 28 ⁷⁹Transcript, at 102-06 & 109-14.

1 Indeed, by the end of Figler's testimony, he asserted only that "I have no recollection
2 whether I had this document or not when I was preparing my appellate briefs" and "I don't
3 recall if I did or didn't." When asked directly whether he did not introduce the Silver letter into
4 evidence at trial because he did not have the Silver letter, he responded: "I don't know."
5 Figler further acknowledged, with regard to De La Garza's testimony on this point, that "if she
6 testified with personal knowledge under oath, I would, knowing Melisa De La Garza, believe
7 her to be a truthful person."⁸⁰

8 Figler's nuanced, equivocal, and *post hoc* rationalized testimony does not credibly
9 establish, contrary to the most plausible reading of the trial transcript, that Figler did not have
10 and use the Silver letter when he cross-examined Akilah City and thus later in preparing the
11 appellate briefing. Nor does his testimony clearly and convincingly overcome the express
12 concession made in the state proceedings and the findings made by the state courts.

13 In this same vein, the Court does not find Christopher Oram's effort at the federal
14 evidentiary hearing to reconstruct what happened in the state post-conviction proceedings to
15 be credible. Oram testified that he had no independent recollection of speaking to Figler prior
16 to making the concession to the state district court quoted in Finding No. 20, although he
17 "may well have." Oram then sought to suggest that he may have made the concession based
18 not on something that Figler said but instead on the fact that the Rayford trial transcript refers
19 to the cross-examination of City with an unidentified letter. Oram expressed the concern that
20 he may have had a conversation with Figler but "that maybe I did not relay it accurately."⁸¹

21 This reconstruction effort is belied by the contemporaneous state court record. On
22 state post-conviction review in the Rayford case, Oram relied upon the fact that the trial
23 transcript of City's cross-examination did not identify the letter to initially argue that the letter
24 was *not* the Silver letter. *E.g.*, #59, Ex. I, at 2, lines 13-15. The trial transcript therefore could
25 not have been a new piece of information that caused Oram to change his position and
26

27 ⁸⁰Transcript, at 110, 117, 118 & 120.

28 ⁸¹*Id.*, at 123, 125 & 127-29.

1 instead concede that the letter was the Silver letter. Rather, as he stated to the state district
2 court, “[h]aving spoken with the attorneys, it is *now* quite clear that the letter Mr. Figler had
3 is the letter in question.” *Id.*, at 2, lines 16-17 (emphasis added); see also *id.*, at 6, lines 15-
4 17. Oram’s federal evidentiary hearing testimony seeking to suggest to the contrary on this
5 point was, at the very best, not credible.

6 The inartful attempted *post hoc* rationalizations of neither lawyer was credible to this
7 Court. Their equivocal testimony based upon dubious argument rather than independent
8 actual recollection indisputably did not present clear and convincing evidence overcoming the
9 state courts’ express factual findings to the contrary.

10 25. Petitioner has not come forward with new reliable evidence that was not presented
11 at the trial that, together with the evidence adduced at trial, demonstrates that it is more likely
12 than not that no reasonable juror would have found him guilty beyond a reasonable doubt in
13 the Franklin case. Akilah City did not recant – and instead reaffirmed – her trial testimony that
14 Taylor participated in the Franklin robbery.⁸² She sought to maintain at the federal evidentiary
15 hearing that Taylor did not plan the robbery, which conflicts with her sworn trial testimony.
16 But even if the Court were to view this particular facet of her hearing testimony as reliable
17 evidence – which it does not – Taylor still would have had culpability as a principal as an aider
18 and abettor. He did not have to be the main force behind the planning of the robbery to be
19 guilty of the offenses for which was convicted, including the conspiracy offense. Nothing in
20 City’s federal evidentiary hearing testimony would tend to establish that no reasonable juror
21 would have found him guilty of the offenses beyond a reasonable doubt.

22 26. Petitioner has not come forward with new reliable evidence that was not presented
23 at the trial that, together with the evidence adduced at trial, demonstrates that it is more likely
24 than not that no reasonable juror would have found him guilty beyond a reasonable doubt in
25 the Rayford case. Petitioner presented no recantation testimony whatsoever as to the
26 Rayford case at the federal evidentiary hearing.

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28 ⁸²Transcript, at 60-61 & 71.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter under 28 U.S.C. § 2254(a).

2. Ground 1 is procedurally defaulted, as to both the Franklin and Rayford convictions.

Under the procedural default doctrine, federal review of a habeas claim may be barred if the state courts rejected the claim on an independent and adequate state law ground due to a procedural default by the petitioner. Review of a defaulted claim will be barred even if the state court also rejected the claim on the merits in the same decision. Federal habeas review will be barred on claims rejected on an independent and adequate state law ground unless the petitioner can demonstrate either: (a) cause for the procedural default and actual prejudice from the alleged violation of federal law; or (b) that a fundamental miscarriage of justice will result in the absence of review. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003).

In the present case, the Supreme Court of Nevada rejected the claims in Ground 1 when they were presented on state post-conviction review because the claims could have been raised on direct appeal in each case but were not.⁸³ Petitioner contends, first, that he can establish both cause and prejudice to overcome the procedural default as to each conviction, based upon alleged non-disclosure by the State of the Silver letter. He contends, second, that a fundamental miscarriage will result in the absence of review. For the reasons assigned in Conclusions Nos. 3 through 9 below, the Court is not persuaded.

3. As to the Franklin conviction, petitioner has demonstrated cause for the failure to raise the claims in Ground 1 on direct appeal, but he has not demonstrated the prejudice necessary to overcome the procedural default.

To demonstrate cause, the petitioner must establish that some objective factor external to the defense impeded his efforts to comply with the state's procedural rule. *E.g., Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *Hivala v. Wood*,

⁸³#45, Ex. 52, at 2-3.

1 195 F.3d 1098, 1105 (9th Cir. 1999). To demonstrate prejudice, he must show that the
2 alleged error resulted in actual harm. *E.g., Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir.
3 1998). Both cause and prejudice must be established. *Murray*, 477 U.S. at 494, 106 S.Ct.
4 at 2649.

5 4. Petitioner has demonstrated cause for the failure to raise Ground 1 on direct appeal
6 in the Franklin case.

7 As the Court has found in Findings Nos. 13 and 14, the Silver letter was not copied to
8 defense counsel, was not provided to either trial or appellate counsel in the Franklin case
9 before the completion of appellate briefing in that case, and thus was not present in the
10 Franklin defense file reviewed by appellate counsel. The Court is confident that, had the
11 Silver letter been in the Franklin defense file, appellate counsel Lori Teicher would have
12 sought to raise an issue in this regard on direct appeal.

13 5. Petitioner has not demonstrated prejudice as to the Franklin conviction, however.

14 Akilah City did not testify falsely that there was no deal or benefit to her from testifying.
15 The Silver letter neither was in existence at the time of her testimony nor had it even been
16 contemplated at that time, much less promised to City. As the Court has found in Findings
17 Nos. 5 through 12, petitioner has failed to establish that there was a prior *quid pro quo*
18 pursuant to which Silver would help City with regard to her parole or otherwise in exchange
19 for her testimony. City instead testified at the Franklin trial to the same effect as her prior
20 statements to the police -- also made without a *quid pro quo* deal -- without any benefit having
21 been supplied or promised by Silver or the State. Petitioner therefore would not have been
22 able to present a claim on direct appeal based on the Silver letter that would have led to a
23 different outcome, whether under *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d
24 1217 (1959), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972),
25 and/or *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner thus
26 cannot demonstrate prejudice with regard to Ground 1 as to the Franklin conviction. A
27 showing of both cause and prejudice is required to overcome the procedural default of the
28 claim. *E.g., Murray, supra*.

1 6. As to the Rayford conviction, petitioner has not demonstrated cause for the failure
2 to raise the claims in Ground 1 on direct appeal.

3 As the Court has found in Findings Nos. 19 through 24, defense counsel in the Rayford
4 case, who was both trial and appellate counsel, had the Silver letter and cross-examined
5 Akilah City about the letter. The testimony presented at the federal evidentiary hearing
6 seeking to establish to the contrary was not credible to this Court. Over and above this
7 Court's own independent *de novo* factual findings after hearing the evidence, petitioner has
8 failed to rebut by clear and convincing evidence the presumption of correctness accorded by
9 28 U.S.C. § 2254(e)(1) to the state court factual findings that defense counsel in the Rayford
10 case cross-examined Akilah City with the Silver letter. *See, e.g., Stevenson v. Lewis*, 384
11 F.3d 1069, 1072 (9th Cir. 2004)(presumption of correctness attaches to factual findings made
12 by state trial level courts and appellate courts alike). Petitioner thus has failed to demonstrate
13 that alleged non-disclosure of the letter prevented defense counsel from raising the claims
14 in Ground 1 on direct appeal in the Rayford case. He thus has failed to demonstrate cause.

15 7. Petitioner accordingly further has failed to demonstrate prejudice as to Ground 1
16 with regard to the Rayford conviction. Because defense counsel both had and used the Silver
17 letter to cross-examine City, he could not have presented a viable claim under *Napue*, *Giglio*
18 and/or *Brady* on direct appeal in the Rayford case.

19 8. Petitioner further has failed to demonstrate – as to either the Franklin conviction or
20 the Rayford conviction – that a fundamental miscarriage of justice will result in the absence
21 of review of Ground 1.

22 A petitioner who cannot show cause and prejudice still may obtain review of his
23 defaulted claims if he can demonstrate that the failure to consider the claims would result in
24 a fundamental miscarriage of justice. In noncapital cases, however, this exception has been
25 recognized only for petitioners who can demonstrate actual innocence. *E.g., Poland v.*
26 *Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997). In order to satisfy this actual innocence
27 gateway, a petitioner must come forward with new reliable evidence that was not presented
28 at the trial that, together with the evidence adduced at trial, demonstrates that it is more likely

1 than not that no reasonable juror would have found the petitioner guilty beyond a reasonable
2 doubt. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *see*
3 *also Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2039
4 (2004). In this regard, “actual innocence” means actual factual innocence, not mere legal
5 insufficiency. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S.Ct. 2514, 2518-19, 120
6 L.Ed.2d 269 (1992). The court “must assess the probative force of the newly presented
7 evidence in connection with the evidence of guilt adduced at trial,” and “may consider how
8 the timing of the submission and the likely credibility of the affiants bear on the probable
9 reliability of that evidence.” *Schlup*, 513 U.S. at 332, 115 S.Ct. at 869.

10 In the present case, petitioner maintained in his federal papers that Akilah City had
11 recanted her trial testimony and would testify if called that her testimony at each trial was
12 false. When called under oath at the evidentiary hearing, however, City stood by and
13 corroborated rather than recanted the substance of her trial testimony as to petitioner’s
14 involvement in the Franklin offenses. She further did not recant her trial testimony in the
15 Rayford case. *See* Findings Nos. 25 & 26. Petitioner accordingly failed to even begin to
16 present new reliable evidence that would render it more likely than not that no reasonable
17 juror would have found him guilty beyond a reasonable doubt in each case.⁸⁴

18 Petitioner thus has not established that a failure to consider the claims in Ground 1 will
19 result in a fundamental miscarriage of justice. In the absence of a showing of actual
20 innocence, there otherwise is not a separate exception for a “miscarriage of justice” based
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22 ⁸⁴City’s purported unsworn recantations to investigators clearly would not constitute reliable evidence
23 that would make it more likely than not that no reasonable juror would have found Taylor guilty – particularly
24 as she did not follow through with any such alleged recantation when called under oath and subject to cross-
25 examination. Indeed, City acknowledged during the Rayford trial that she had made exculpatory and/or
26 impeaching statements to defense investigators prior to the trial. She testified then that she made those
27 statements because the investigators were bothering her and she did not want to see them. #43, Ex. 23, at
28 36-38. Just as jurors in the Rayford case rendered a verdict consistent with City’s sworn testimony rather
than her unsworn statements to defense investigators, petitioner cannot establish that City’s unsworn
recantations – to investigators for a man for whom she apparently still feels affection and with whom she
shares a son – would make it more probable than not that no reasonable juror would find him guilty beyond a
reasonable doubt. Moreover, particularly in the Franklin case, there was ample evidence upon which to base
a conviction in each case without City’s testimony. *See* Finding Nos. 4 & 15.

1 upon the premise that the underlying alleged constitutional violations in a noncapital state
2 criminal trial gave rise to “a fundamental miscarriage of justice.” *See, e.g., Johnson v.*
3 *Knowles*, 541 F.3d 933 (9th Cir. 2008). A showing of actual innocence is the sole – and
4 essential – requirement to establish a fundamental miscarriage of justice in order to avoid a
5 procedural default. *Id.* Petitioner has failed to satisfy this requirement in the present case.

6 9. Ground 1 accordingly is procedurally defaulted as to the both convictions. Petitioner
7 has failed to demonstrate both cause and prejudice as to each conviction with regard to
8 Ground 1. He further has not demonstrated that a failure to review Ground 1 will result in a
9 fundamental miscarriage of justice.

10 10. The Court holds, in the alternative, on *de novo* review as to the law, that Ground
11 1 is without merit. As discussed in Conclusions Nos. 5 and 7, petitioner cannot establish a
12 viable claim under *Napue*, *Giglio*, and *Brady* concerning the Silver letter with regard to either
13 trial. In the Franklin case, City’s testimony was not false because the Silver letter did not exist
14 and had not been contemplated or promised when City testified in that case. In the Rayford
15 case, defense counsel possessed the Silver letter and cross-examined City about the letter.

16 11. On Ground 2, the state supreme court’s rejection of petitioner’s challenge to the
17 sufficiency of the evidence presented at the Franklin trial was neither contrary to nor an
18 unreasonable application of clearly established federal law.

19 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly
20 deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 117 S.Ct. 2059,
21 2066 n.7(1997). Under this deferential standard of review, a federal court may not grant
22 habeas relief merely on the basis that a state court decision was incorrect or erroneous. *E.g.,*
23 *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Instead, under 28 U.S.C. § 2254(d),
24 the federal court may grant habeas relief only if the decision: (1) was either contrary to or
25 involved an unreasonable application of clearly established law as determined by the United
26 States Supreme Court; or (2) was based on an unreasonable determination of the facts in
27 light of the evidence presented at the state court proceeding. *E.g., Mitchell v. Esparza*, 540
28 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

1 A state court decision is “contrary to” law clearly established by the Supreme Court only
2 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
3 if the decision confronts a set of facts that are materially indistinguishable from a Supreme
4 Court decision and nevertheless arrives at a different result. *E.g., Mitchell*, 540 U.S. at 15-16,
5 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely
6 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has
7 held that a state court need not even be aware of its precedents, so long as neither the
8 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may
9 not overrule a state court for simply holding a view different from its own, when the precedent
10 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11.
11 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme
12 Court precedent is not contrary to clearly established federal law.

13 A state court decision constitutes an “unreasonable application” of clearly established
14 federal law only if it is demonstrated that the state court’s application of Supreme Court
15 precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.,*
16 *Mitchell*, 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir.
17 2003).

18 On a challenge to the sufficiency of the evidence, the habeas petitioner faces a
19 “considerable hurdle.” *Davis v. Woodford*, 333 F.3d 982, 992 (9th Cir. 2003). Under the
20 standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
21 (1979), the jury’s verdict must stand if, after viewing the evidence in the light most favorable
22 to the prosecution, any rational trier of fact could have found the essential elements of the
23 offense beyond a reasonable doubt. *E.g., Davis*, 333 F.3d at 992. Accordingly, the reviewing
24 court, when faced with a record of historical facts that supports conflicting inferences, must
25 presume that the trier of fact resolved any such conflicts in favor of the prosecution and defer
26 to that resolution, even if the resolution by the state court trier of fact of specific conflicts does
27 not affirmatively appear in the record. *Id.* The *Jackson* standard is applied with reference to
28 the substantive elements of the criminal offense as defined by state law. *E.g., Davis*, 333

1 F.3d at 992. When the review deferential standards of the AEDPA and *Jackson* are applied
2 together, the controlling question for decision on federal habeas review thus becomes one
3 of whether the Nevada Supreme Court's decision reflected an unreasonable application of
4 the *Jackson* standard to the evidence presented at trial. *See, e.g., Juan H. v. Allen*, 408 F.3d
5 1262, 1274-75 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137, 126 S.Ct. 1142, 1145, 163 L.Ed.2d
6 1000 (2006).

7 In rejecting petitioner's challenge to the sufficiency of the evidence in the Franklin case,
8 the Supreme Court of Nevada concluded that "sufficient evidence was adduced from which
9 the jury, acting reasonably and rationally, could have found the elements of conspiracy to
10 commit robbery, burglary while in possession of a firearm, and robbery with the use of a
11 deadly weapon beyond a reasonable doubt."⁸⁵

12 In the exhausted claim remaining before this Court, petitioner urges that the evidence
13 at the Franklin trial was insufficient because Akilah City had a strong motive to lie. Petitioner
14 contended on the state direct appeal that City's testimony was unreliable because she was
15 "a scorned girlfriend."⁸⁶ The state supreme court's rejection of this claim clearly was neither
16 contrary to nor an unreasonable application of the *Jackson* standard.

17 First, the credibility and reliability of Akilah City's testimony was for the jury to weigh.
18 City's alleged motives for testifying were fodder for closing argument, not for a viable
19 constitutional challenge to the sufficiency of the evidence.

20 Second, there was not merely sufficient but instead ample evidence of Taylor's guilt
21 even without Akilah City's testimony. Taylor admitted to the police that he was in Franklin's
22 apartment at the time of the robbery, and the defense conceded at trial that he was there at
23 that time. Taylor maintained that he thought he was there only to help City move something
24 and that he did not realize until later that he was in the midst of a robbery. While Taylor's
25 strained story hardly stood under its own weight, his story as to what transpired while he was

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27 ⁸⁵#44, Ex. 39, at 9.

28 ⁸⁶See # 55, at 12-14; #44, Ex. 32, at 15-16.

1 in Franklin's apartment with Price and City is directly contradicted by Franklin's testimony as
2 to what she heard while pretending to be unconscious. Given Taylor's concession that he
3 was there with Price and City at the relevant time, the jury only had to believe Franklin to
4 convict on all counts, without ever considering City's testimony. See Finding No. 4.

5 The state supreme court's rejection of this claim accordingly was neither contrary to
6 nor an unreasonable application of clearly established federal law.

7 12. The state supreme court's rejection of petitioner's challenge to the sufficiency of
8 the evidence presented at the Rayford trial was neither contrary to nor an unreasonable
9 application of clearly established federal law.

10 In the exhausted claim remaining before the Court, petitioner contends that the State's
11 evidence, on its face, was insufficient to prove the requisite elements of the offenses in
12 question.⁸⁷ The Supreme Court of Nevada concluded that there was sufficient circumstantial
13 evidence for a rational trier of fact to find the essential elements of first-degree murder and
14 robbery.⁸⁸ The state high court's rejection of this claim was neither contrary to nor an
15 unreasonable application of the *Jackson* standard. The State presented evidence, *inter alia*,
16 that Taylor solicited City to help him shoot and kill an individual from California on the
17 afternoon immediately prior to Rayford being shot to death; that the last telephone call placed
18 by Rayford on the morning that he was murdered went to Taylor and concluded only a short
19 time before Rayford's likely time of death; that Taylor placed a call to Rayford's girlfriend in
20 California only a short time after the likely time of death in an amateurish effort to cover his
21 tracks, calling on the same cell phone that Rayford had brought with him from California; that
22 Taylor had Rayford's possessions, including the cell phone and unique items of clothing and
23 jewelry, after the murder; and that Rayford's body was found in a motel room with no clothes
24 in the room suitable for going outside the room and with the inner lock that can be engaged
25 only from the inside not being engaged. A rational trier of fact could have found beyond a

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27 ⁸⁷See #55, at 12-13.

28 ⁸⁸See #44, Ex. 33, at 1-2.

1 reasonable doubt based on the circumstantial evidence presented that the last person to
2 close the door prior to the mid-morning housekeeping check was the murderer leaving with
3 Rayford's clothes and that the murderer was Taylor, consistent with his previously stated plan
4 to kill and rob Rayford. See Finding No. 15.

5 The state supreme court's rejection of this claim accordingly was neither contrary to
6 nor an unreasonable application of clearly established federal law.

7 14. Petitioner is not entitled to a certificate of appealability as to the dismissal of
8 Ground 1 with prejudice as procedurally defaulted.

9 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must
10 issue or deny a certificate of appealability when it enters a final order adverse to the
11 petitioner. A district court order granting or denying a certificate of appealability does not
12 eliminate the requirement of filing a timely notice of appeal. A motion to reconsider the order
13 regarding a certificate of appealability does not extend the time to appeal.

14 As to claims rejected on procedural grounds, the petitioner must show: (1) that jurists
15 of reason would find it debatable whether the petition stated a valid claim of a denial of a
16 constitutional right; and (2) that jurists of reason would find it debatable whether the district
17 court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct.
18 1595, 1604, 146 L.Ed.2d 542 (2000). While both showings must be made to obtain a
19 certificate of appealability, "a court may find that it can dispose of the application in a fair and
20 prompt manner if it proceeds first to resolve the issue whose answer is more apparent from
21 the record and arguments." 529 U.S. at 485, 120 S.Ct. at 1604. Where a plain procedural
22 bar is properly invoked, an appeal is not warranted. 529 U.S. at 484, 120 S.Ct. at 1604.

23 Given the evidence presented and factual the findings made herein, jurists of reason
24 would not find the district court's holding that Ground 1 is barred by procedural default to be
25 debatable or wrong. With regard to the Franklin trial, petitioner failed to demonstrate
26 prejudice as to Ground 1 because the witness did not testify falsely with regard to a letter that
27 did not exist and that was not contemplated or promised when she testified. Petitioner did not
28 establish by a preponderance of the evidence the existence of a prior *quid pro quo* agreement

1 or understanding, and the Silver letter instead constituted a spontaneous, gratuitous act after
2 the fact. See Conclusion No. 5. With regard to the Rayford trial, petitioner failed to
3 demonstrate either cause or prejudice as to Ground 1 because defense counsel not only had
4 the Silver letter but cross-examined the witness with regard to the letter. See Conclusions
5 Nos. 6 & 7. Petitioner further did not present any sworn recantation testimony, and he failed
6 to demonstrate that a fundamental miscarriage of justice would result from a failure to review
7 Ground 1 on the merits. See Conclusion No. 8.⁸⁹

8 15. Petitioner is not entitled to a certificate of appealability as to the dismissal of
9 Ground 2 on the merits.

10 As to the claims rejected by the district court on the merits, under 28 U.S.C. § 2253(c),
11 a petitioner must make a "substantial showing of the denial of a constitutional right" in order
12 to obtain a certificate of appealability. *Slack*, 529 U.S. at 483-84, 120 S.Ct. at 1603-04;
13 *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this standard, the petitioner
14 "must demonstrate that reasonable jurists would find the district court's assessment of the
15 constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

16 Jurists of reason would not find the district court's rejection of the Ground 2 on the
17 merits to be debatable or wrong. Petitioner's challenges in Ground 2 to the sufficiency of the
18 evidence at both trials at bottom concern matters going to the weight to be given to evidence
19 that properly were committed to the jury's determination in each case. See Conclusions Nos.
20 11 & 12.

21 If any Finding of Fact is considered to be a Conclusion of Law, or any Conclusion of
22 Law is considered to be a Finding of Fact, it is the Court's intention that it be so considered.

23 ORDER

24 IT THEREFORE IS ORDERED that Ground 1 is DISMISSED with prejudice on the
25 basis of procedural default and that Ground 2 is DISMISSED with prejudice on the merits.
26

27 ⁸⁹Petitioner further is not entitled to a certificate of appealability as to the Court's alternative holding
28 that Ground 1 is without merit, for substantially the reasons discussed in the text. See Conclusion No. 10.

1 IT FURTHER IS ORDERED that a certificate of appealability is DENIED.

2 The Clerk of Court shall enter final judgment accordingly, dismissing this action with
3 prejudice.

4 DATED: July 27, 2010.

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KENT J. DAWSON
United States District Judge
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